SUPPORTING BRIEF.

Reported Opinions Delivered in the Courts Below.

The opinion of the Circuit Court of Appeals (R. 68-71) delivered on entry herein in cases numbers 7888 and 7891 of its identical judgments (R. 72-73) of July 18, 1942, is not as yet officially reported.

Companion and related cases between the same parties (listed chronologically) are reported, CCA Cases Nos. 6696 and 6733 as *In re 4145 Broadway Hotel Company,* 100 Fed. 2nd, 7; CCA Case No. 6932 as *In re 4145 Broadway Hotel Company,* 130 Fed. 2nd, 487; CCA Case No. 7497 as *In re 4145 Broadway Hotel Company,* 117 Fed. 2nd, 639, cert. den'd. 313 U. S. 593, and CCA Case number 7763 as *In re 4145 Broadway Hotel Company,* 124 Fed. 2nd, 821.

Grounds of Invocation of This Court's Jurisdiction.

(1) The District Court's attachment of petitioner for contempt and the affirmance thereof by the Circuit Court of Appeals is denial to petitioner and violation of petitioner's guaranteed civil rights (R. 44, pars. numbered 14, 16, 17 and 18; Trans. 7497, pp. 63-64; Trans. 6696, p. 94; see also CCA Brief for Appellant herein, p. 8, last 6 lines, and pp. 3, last line,—4, 1st 2 lines) to preserve which to all of us demands their preservation to each of us,—only the more so during possibly distracting global war for the rights and liberties of all men.

The petition of respondents upon which the injunction of May 26, 1938 was entered (Trans. 6696, pp. 2-8) alleged no act of the petitioner as basis for the injunction except the mailing out by petitioner of his letter of April

27, 1938, pending petitioner's motion for leave to file his proposed 2nd amended petition (Trans. 6696, pp. 5-8), **and prayed no injunction whatever** (Trans. 6696, p. 4). Your petitioner's answer (Trans. 6696, pp. 8-13) denied substantially every allegation of that petition except the sending out his letter of April 27, 1938, which he admitted. At the hearing on May 23, 1938, **no evidence was offered or received** (Trans. 6696, pp. 62-67; reprinted *post*).

Respondent's petition of June 17, 1940 (Trans. 7497, pp. 17-27) on which it was decreed (Trans. 7497, p. 161, par. 9) that the injunction of May 26, 1938, was still in full force and effect, charged no acts of petitioner as of or prior to May 26, 1938, and prayed neither construction, continuance, extension or re-entry of the injunction of May 26, 1938 (Trans. 7497, p. 27); and on the hearing of that petition **no testimony was received or offered to any such end** (Trans. 7497, pp. 65-101).

So it was that your petitioner was never faced with charges that were or were supposed to be basis for any such injunction as the lower courts, in order to sustain commitment of your petitioner for contempt of court, now by misconstruction would make out the injunction of May 26, 1938 to have been.

As the lower courts would now construe the injunction of May 26, 1938, that injunction, neither *allegata* nor *probata* behind it, not only deprives petitioner of his personal liberty and steals his purse, his property rights, but robs him of his right of free speech,—either for the presumable ten-year life of the reorganization trust (Trans. 7497, par. 17, p. 7 and par 21, p. 8) or until the bankruptcy court, in its apparently uncontrolled discretion, gets around to entering final decree in the bankruptcy proceedings proper.

Illustrative of what this muzzling of petitioner involved at the hands of the District Court, June 23, 1938 (R. 36), his Honor Judge William H. Holly denied your petitioner leave to write his clients, holders of a majority (Trans. 7497, pp. 148-149), 6498 shares of stock of the reorganized debtor (Trans. 7497, p. 62), that they had not heard from petitioner because petitioner had been enjoined from communicating with other shareholders and that petitioner intended to appeal the matter to the United States Circuit Court of Appeals but that until it was decided by that court petitioner was not in a position to freely communicate with stockholders (Trans. 6696, p. 33, par. numbered 9th).

In the foregoing we are not unmindful that a victim may waive both *allegata* and *probata* by consent. But, as above presented, the "consent" of your petitioner was not a voluntary consent but was extorted from him by threat of his Honor William H. Holly that otherwise his Honor would attach your petitioner for fancied contempt of court in sending out his letter of April 27, 1938. And that consent was to the injunction of May 26, 1928, not to any such injunction as the lower courts, by shutting their eyes to the record herein and closing their ears to the established rules of law, would now make out that injunction to have been.

(2) The involved matters and things are of momentous public concern:

(a) Tho not parties hereto the guaranteed civil rights of at least thirteen hundred individual stockholders, residents of 38 states, the Philippine Islands, the Canal Zone, Canada, Ireland and Portugal are immediately involved.

(b) The history of this long drawn out litigation is story of the use and abuse of processes of the

federal courts and prostitution of the Bankruptcy Act to the ends of the vicious nation-wide House-of-Issue, Defaulted-Bondholders'-Committee racket (Securities and Exchange Commission Report on Study and Investigation of the Work Activities, Personnel and Functions of Protective and Reorganization Committees, and the Final Report by the Select Committee to Investigate Bondholders' Reorganizations, authorized by House Resolution 412, 73d Congress, both available in the Congressional Library).

(c) The proper construction of the Bankruptcy Act is of course of first importance to the general public, and insofar as the questions raised touching the Bankruptcy Act are procedural, they are of only the wider public interest because apt more commonly to arise.

(3) In the instant case (Opinion, R. 68-71) and In re 4145 Broadway Hotel Company, 100 Fed. 2nd, 7, the Circuit Court of Appeals holds that the nature and life of the injunction of May 26, 1938, is to be determined from the whole record. Contrariwise, In re 4145 Broadway Hotel Company, 117 Fed. 2nd, 639, the same court holds and In re 4145 Broadway Hotel Company, 124 Fed. 2nd, 821, says that the face of the injunctional order alone is determinative of this controlling question of law. This conflict of decisions by the Circuit Court of Appeals for the Seventh Circuit on the same matter and between the same parties is within the letter and spirit of the first clause of Rule 38, 5 (b).

True (Opinion, R. 70, last two lines; and Petition for Rehearing, R. 103, lines 15-24), the Circuit Court of Appeals, in defiance of the record (Trans. 6696, pp. 62-67, reprinted in full, *post*), misapplies the rule to support its erroneous conclusion that the clear purport of the injunction was to restrain petitioner from interfering "with the operation or execution of the plan as con-

firmed". To no human mind can such be said to be the purport, clear or otherwise, of the face of the order of May 26, 1938. The proof of that is mere matter of reading the order (Trans. 7497, pp. 10-11). It follows that the Circuit Court of Appeals itself relies on the whole record, for on no other basis under heaven can the purport of that order be determined, clearly or, as by the Circuit Court of Appeals in the instant case, erroneously.

(4) By its decision review of which is sought, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court, as to call for an exercise of this Honorable Court's powers of supervision.

(5) The record herein, the decisions herein of the Circuit Court of Appeals and the common practice and decisions in the same general field of other federal courts present such a contrariety in practical administration of the Bankruptcy Act as to commend the instant case to the consideration of this Honorable Court. Case et al., v. Los Angeles Lumber Products Co., Ltd., 308 U. S. 106, 109.

(6) So far as we find, this Honorable Court has never determined or established any definite rule as to how long, to what extent, of what and for what purposes or to what ends a bankruptcy court may retain jurisdiction in bankruptcy after confirmation and consummation of the plan of reorganization. The interpretation in these respects of the federal statute presents important questions of federal law which have not been, but should be, settled by this Honorable Court.

In the instant case, and so far as we have been able to discover for the first time in history, the Circuit Court of Appeals actually holds (Opinion R. 7, last 7 lines)

that from the provision of Section 207, par. (h) that the plan of reorganization is to be put into effect "under and subject to the supervision and control of the judge" it follows that **after consummation of the plan** of reorganization the bankruptcy court continues to enjoy authority to enjoin any act by any one "inconsistent with or which will interfere with the **OPERATION** or execution of the plan as confirmed". The plan is executed when it is consummated and thereafter there is no plan but a new entity whose the operation is. If the bankruptcy court has control of that operation then the bankruptcy court has paternal control of a reorganized corporation for the existence of the corporation and of a reorganized individual debtor for his life.

STATEMENT OF THE CASE.

The Basic Case

4145 Broadway Hotel Company, is a reorganized Illinois debtor corporation, the bankruptcy proceedings instituted Aug. 10, 1934 (R. 32). Plan of reorganization was confirmed March 7, 1935 (Trans. 7497, pp. 2-8). May 10, 1935, a reorganization Trust Agreement of May 1, 1935 (Trans. 7497, pp. 142-147) and the form of trust certificates thereunder were approved by the District Court and distribution according to the plan of reorganization ordered (Trans. 7497, p. 8). July 26, 1935, the receiver's final report was approved, his and his attorney's fees fixed and paid (R. 34) and the application for fees to be allowed other persons continued to September 16, 1935 (R. 34),—finally fixed November 18, 1935 (R. 34). Meanwhile, on July 29, 1935, respondents Rossetter and McCord and one Paul Steinbrecher (since deceased, and succeeded by respondent Rosenthal), as reorganization trustees, took possession of the reorganized debtor corporation's property (see, Trans. 6696, p. 6, 9th line). In explanation, later

(Trans. 6696, p. 38, par. 11), of their delay in taking possession respondents stated that while the reorganization plan was confirmed March 7, 1935, "a great deal of work was required **to consummate the plan** and it was not until several months later that all of the legal details had been arranged and the Trustees were in a position **to take over the supervision of the property.**"

From November, 1935, when the last fees were fixed, to January 18, 1938 (see, Trans. 6696, p. 5, 8th line from bot.), there were no proceedings whatever in the bankruptcy case. But following your petitioner moving January 24, 1938 (R. 34), for leave to intervene on May 14, 1938 (R. 35), entry of final decree was set for June 15, 1938, and followed by orders of continuance of entry of final decree, the last of which (September 30, 1938, R. 36) continued the same generally.

To date the final decree in the bankruptcy case has not been entered.

Your Petitioner Your petitioner F. Gerald Thomas is a real estate broker and was a member of the Chicago Advisory Committee to the Congressional Select Committee to Investigate Bondholders' Reorganizations authorized by House Resolution 412, is himself a stockholder of 4145 Broadway Hotel Company and is general attorney in fact for a majority (Trans. 7497, pp. 148-149), 6,498 shares (Trans. 7497, p. 62), of 11,683 total outstanding shares of stock of the reorganized debtor corporation (Trans. 7497, p. 67). These outstanding 11,683 shares of stock are evidenced almost entirely by participating certificates issued under the reorganization Trust Agreement of May 1, 1935, and are owned by approximately 1300 individual residents of thirty-eight States, the Philippine Islands, the Canal Zone, Canada, Ireland and Portugal.

Respondents—The House of Issue Respondents Rossetter, McCord and Rosenthal were and still claim to be trustees under the reorganization Trust Agreement and reorganization directors of the reorganized debtor corporation. The House of Issue of the bonds in exchange for which, under the reorganization plan, the outstanding 11,683 shares of stock of the reorganized company issued was S. W. Straus & Company (Trans. 7497, p. 78), succeeded upon the demise of that company by its subsidiary Securities Service Corporation. Respondents Rossetter and McCord and one Sidney H. Kahn (the latter a former officer of S. W. Straus & Co., Trans. 7497, p. 78) were S. W. Straus & Company's Bond Holders Committee, and held possession until the reorganization trustees took over. Following reorganization of the debtor corporation respondents Rossetter and McCord and one Paul Steinbrecher, since deceased, became stock trustees (Trans. 7497, p. 147). Upon Steinbrecher's death respondents Rossetter and McCord appointed respondent Rosenthal to fill the vacancy (Trans. 7497, p. 79). Steinbrecher, one of the original appointees, it so happened was not a member of the particular S. W. Straus & Company's Bond Holders Committee for this issue. Rosenthal is a former employee of S. W. Straus & Co., and today is president of Securities Service Corporation, which, to quote Mr. Rosenthal (Trans. 7497, p. 78), "was an outgrowth of S. W. Straus & Company," and commonly serves on managing committees and as secretary of bond holders' committees, "for the most part S. W. Straus & Company issues" (Trans. 7497, p. 78).*

* See, further, Securities and Exchange Commission Report on Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, and the Final Report by the Select Committee to Investigate Bondholders' Reorganizations, authorized by House Resolution 412, 73d Congress, both available in the Congressional Library.

Attempted Reservations of Jurisdiction The order of March 7, 1935, confirming the plan of reorganization (your petitioner insists inconsistently with the plan of reorganization and the relevant provisions of the Bankruptcy Act) provided (Trans. 7497, pars. 17-18, p. 7 and par. 21, p. 8):

> "18. The Court hereby reserves jurisdiction over the trust to be created pursuant to the plan of reorganization and over the Trustees from time to time acting as Trustees under said Trust Agreement for the purpose of supervising the acts and doings of such Trustees and for the purpose in all respects of protecting and safeguarding the rights of the holders of the trust certificates from time to time outstanding, and reserves jurisdiction over the property in any and all matters involving said Trustees or the holders of said trust certificates. Said Trustees shall file annually a report showing the receipts and disbursements for each calendar year and shall periodically send or cause the debtor to send reports covering the **operations of the property** to all stockholders and certificate holders."
>
> "21. The Court reserves jurisdiction herein to enter such further orders as hereinafter may be deemed necessary and proper in connection with carrying out the terms and provisions of said plan of reorganization as amended and this order and terminating this cause."

Certain Provisions of the Trust Agreement The Trust Agreement of May 1, 1935, Article III (Trans. 7497, p. 19) provides:

> "If the Trustees in their sole discretion deem it advisable, they may, before or after submitting the terms of any proposed sale or mortgage to the Certificate Holders as hereinabove provided, request the approval to the terms of said proposed sale or mortgage of the court in the case entitled 'In the Matter of 4145 Broadway Hotel Company, a Corporation,

Debtor,' No. 56875, in the District Court of the United States for the Northern District of Illinois, Eastern Division, or if the Court be unable to act in said proceedings, then the approval of any court of competent jurisdiction; provided, however, that the submission of such sale or mortgage to said Court shall in no manner be construed as mandatory upon the Trustees."

Article 8, section 8, provides that certificate holders (stockholders) may take any action they are permitted to take under the Trust Agreement "in person or by attorney-in-fact appointed in writing" (Trans. 7497, p. 147).

Plan of Reorganization The plan of reorganization does not appear in full in the record herein in the Circuit Court of Appeals. In that court it was agreed by counsel, and in effect assented to by the Court of Appeals that the plan of reorganization be taken as before the court and that both counsel would make such statements touching the contents of the same as they deemed material, subject to dissent or correction in the brief of opposing counsel. Under this understanding no difference arose between counsel. However, for the possible convenience of this Honorable Court we print as an appendix to our brief the plan of reorganization as submitted to and adopted by the interested parties (Trans. 7497, p. 3, par. a).

The plan of reorganization contains no provision in terms authorizing or suggesting the attempted reservations of jurisdiction in the order confirming the plan of reorganization; and contemplates organization of a new corporation to operate the involved estate.

The sole basis for Article III of the Trust Agreement above presented to be found in the plan of reorganization is the following:

"The Trustees shall have the right to apply to any court of competent jurisdiction for its approval before completing any sale or mortgage of the property or before completing any sale of the stock held by them, but shall not be required to do so."

Petitioner's Motions for leave to intervene April 15, 1938, your petitioner entered the third of three motions by your petitioner in the District Court for leave to file, this third time your petitioner's so-called second amended petition (R. 35). This proposed second amended petition was never reduced to record but the record otherwise shows its general nature (R. 35 and Trans. 6696, p. 3, 3rd par. and pp. 5-8), namely, that it sought to invoke the supposed powers of the District Court over the reorganization trustees by reason of the attempted reservations of jurisdiction in the order of March 7, 1935, confirming the plan of reorganization, complained of the trustees' failure to take possession until July 29, 1935, of the trustees' failure to file annual reports until February 8, 1938 (R. 35), and of bad management of the estate by the trustees when they did take possession, and also sought (R. 34, last three lines) to reopen prior discharge by the District Court (R. 34, lines 13-16) of a State court receiver.

Order of May 23, 1938 May 23, 1938, **no evidence received or offered**, the District Court denied petitioner leave to file this proposed second amended petition, on the ground, among others, that "the allegations in the second amended petition are not relevant to the acts and doings of the Trustees over whom [which] the court has retained jurisdiction" (R. 7-8, 2nd par.).

First Contempt Proceedings against Petitioner Meanwhile, on May 1, 1938, respondents Rossetter, McCord and Rosenthal filed a sworn petition (Trans. 6696, pp.

2-8) alleging that during the pendency of petitioner's motion of April 15, 1938, your petitioner mailed to stockholders a letter of April 27, 1938, copy attached to respondents' petition (Trans. 6696, pp. 5-8), and in that letter made charges against respondents **"similar to those contained in the second amended petition"** (Trans. 6696, p. 3, 3rd Par.), **the subject matter of the letter the same as petitioner's pending motion,** and that the mailing of the letter was "an affront and an insult to the court **while said litigation is pending and undisposed of";** and praying an order restraining petitioner **until further order of the court** from sending out any further communications or soliciting or accepting any powers of attorney from stockholders, and a rule on petitioner to show cause why he should not be held in contempt of court for sending out the letter of April 27, 1938 (Trans. 6696, p. 4). May 5, 1938, a restraining order as so prayed by respondents was entered on the face **(no proofs taken)** of respondents' petition, your petitioner ordered to show cause within ten days why he should not be attached for contempt of court and the matter set for hearing May 23, 1938 (Trans. 6696, pp. 14-15).

May 16, 1938 (Trans. 6696, pp. 8-13), your petitioner answered the rule under oath and denied substantially every allegation of respondents' petition except that he admitted the sending out of his letter (Exhibit A, to respondents' petition, Trans. 6696, pp. 5-7) of April 27, 1938.

Entry of Injunction of May 26, 1938 On May 23, 1938, the court having denied or announced its decision to deny petitioner leave to intervene, his Honor stated that unless petitioner **was willing** to be enjoined from sending out communications to stockholders and from using his powers of attorney **pending appeal by petitioner from the order of May 23, 1938,** the court would attach petitioner

for contempt for sending out petitioner's letter of April 27, 1938. Petitioner inquiring whether petitioner could not appeal from such an injunction, **the court said that if the injunction could not be a consent order** the court would proceed with the contempt matter. On these premises petitioner did consent **to be enjoined pending possible appeal from the order of May 23, 1938.** Thereupon counsel for respondents were directed by the court and undertook to draft an injunction order **"to that effect"** (Trans. 6696, pp. 64, 66, 67). The result was the order of injunction entered May 26, 1938 (R. 52; Trans. 7497, pp. 10-11; Trans. 6696, p. 17),—**the head and front of all subsequent litigation between the parties hereto.**

Denial of Special Leave to Write Stockholders June 23, 1938, the court denied your petitioner leave to write shareholders (R. 36, first two lines) that (Trans. 6696, p. 33) the stockholders had not heard from petitioner since his letter of April 27, 1938, because the District Court had enjoined petitioner from communicating with other shareholders; that petitioner intended to appeal to the Circuit Court of Appeals and that until the matter was decided by that court petitioner would not be in a position to communicate with stockholders, but that petitioner was not dropping the matter.

Motion to Declare Injunction Ended February 14, 1939 (R. 36), petitioner petitioned the District Court to vacate or otherwise hold for nought the injunction of May 26, 1938, on the ground that it had expired at midnight June 22, 1938 (Trans. 7497, p. 11). **No evidence was offered,** but the petition was denied March 20, 1939, on the face of the record (R. 37); leave to appeal denied by the Circuit Court of Appeals April 27, 1939. *In re 4145 Broadway Hotel Co.,* 130 Fed. 2nd, 487.

Referendum of May 1, 1939 Upon referendum under the Trust Agreement (Trans. 7497, p. 146), as of May 1, 1939, whether to continue or discontinue the trust, your petitioner voted under his powers of attorney to discontinue the trust (Trans. 7497, pp. 131-140).

Dissent to Mortgage, May 22, 1940 May 22, 1940, upon vote of stockholders required by the Trust Agreement (Article 3, Trans. 7497, pages 143, last three lines,-144, first 25 lines) whether to place a $110,-000.00 mortgage on the Hotel Company's real estate, your petitioner voted under his powers of attorney against the placing of such mortgage (Trans. 7497, pp. 104-105).

Removal of Trustees, June, 1940 June 15, 1940, pursuant to provision therefor in the Trust Agreement (Art. 6, Sec. 4, Trans. 7497, p. 145), by instrument in writing signed by your petitioner under his powers of attorney your petitioner in terms removed all of respondents as trustees (Trans. 7497, pp. 148-149).

Decree of August 6, 1940 By decretal order of August 6, 1940 (Trans. 7497, pp. 159-163; aff'd., *In re 4145 Broadway Hotel Co.*, 117 Fed. 2nd, 639), the District Court held that the trust had not been terminated in the May 1, 1939, referendum, that the placing of the $110,000.00 mortgage had not been effectively dissented to in 1940 and that the trustees were not removed in 1940, **all on the ground that these acts of your petitioner in 1939 and 1940 to those ends were in violation of the injunction of May 26, 1938, and void.**

Referendum of May 1, 1941 Upon referendum under the Trust Agreement (Trans. 7497, p. 146) as of May 1, 1941, whether the trust should be continued or discontinued, your petitioner participated by writing

stockholders letters of March 15, 1941 (Trans. 7763, pp. 27-31) and April 5, 1941 (Trans. 7763, pp. 59-64), and by participating and aiding one Rose Mary King in sending out to stockholders over her name a circular letter of March 17, 1941 (Trans. 7763, p. 25).

Acts for Which Petitioner Is Committed to Jail These two letters of your petitioner dated March 15, and April 5, 1941, and his participation in the sending out of the Rose Mary King letter of March 17, 1941, are the acts of your petitioner for which he is now committed to the County Jail for ninety days **on the ground that these acts of petitioner in 1941 were in violation of the injunction of May 26, 1938** (Circuit Court of Appeals Opinion, R. 69, lines 2-12; Trans 7763, pp. 8, 9, 14-15, 27, 59).

The Red Herring The Circuit Court of Appeals' "the sordid history of this reorganization matter" (Opinion, R. 69) is re-echo of the mud slinging to which your petitioner has been subjected throughout this whole litigation, well illustrated by charge **by respondents** that your petitioner obtained his powers of attorney by "misrepresentation". On second appeal (*In re 4145 Broadway Hotel Co.,* 117 Fed. 2nd, 639, 641) the Court of Appeals said that it found "ample evidence in the record to sustain" this charge.

No provision of the Trust agreement makes these stock trustees guardians of or responsible for the dealings of stockholders with each other, and no one but respondents, no stockholder who had given power of attorney to your petitioner ever so charged or complained.

And no color of proof appeared in the record that any material representation was (1) false, (2) was known to

your petitioner to be false, (3) was made by petitioner with intent to deceive or (4) ever deceived or was relied upon by any stockholder. In the instant case we for the second time challenged respondents, and now again challenge respondents to show otherwise from the record (CCA Reply Brief for Appellant, p. 4); and in our petition for rehearing to the Circuit Court of Appeals urged that respondents never having responded to our challenge the Circuit Court of Appeals should not now repeat or by implication adopt any such statement without itself taking up your petitioner's glove (petition for rehearing, R. 87, par. 1).

Errors to be Urged.

We urge that the trial court erred in the following respects, in most instances for, among other reasons, lack of jurisdiction, and that the Circuit Court of Appeals erred in approving and affirming the errors of the trial court, the trial court erring:

(1) In coercing your petitioner to consent to the entry, May 26, 1938, of any injunction of your petitioner.

(2) In entering the injunctional order of May 26, 1938, properly construed.

(3) In construing the injunction of May 26, 1938, as now construed by both the District Court and the Circuit Court of Appeals and holding that so construed the District Court had jurisdiction to enter same.

(4) In now holding that petitioner consented to an injunction in terms and effect as the injunction of May 26, 1938, is now construed by the District Court and by the Circuit Court of Appeals.

(5) In holding that the nature, purpose and life of the injunction of May 26, 1938 is not to be determined from the whole record.

(6) In not holding that the injunction of May 26, 1938, was to preserve the *status quo* of the proceedings by petitioner for leave to intervene, and enjoined petitioner only pending appeal or legal possibility of appeal by petitioner from the order of May 23, 1938.

(7) In not holding that petitioner never having appealed from the order of May 23, 1938, and legal possibility of such appeal having passed by operation of law at midnight, June 22, 1938, the injunction of May 26, 1938, at that hour expired and ceased to operate as a restraint upon petitioner, whether so by operation of law or by the very terms of the order of injunction properly read in the light of the whole record.

(8) In not holding that the injunction of May 26, 1938, expired at midnight June 22, 1938, without order to that effect by any court.

(9) In refusing to grant petitioner's petition of February 14, 1939, and to vacate or hold the injunction of May 26, 1938 for nought as prayed by petitioner.

(10) In holding and decreeing in the decretal order of August 6, 1940, or at any other time, that the injunction of May 26, 1938, continued in force after June 22, 1938, and was in full force and effect on August 6, 1940, or at any other time after June 22, 1938.

(11) In entertaining respondents' petition of June 17, 1940.

(12) In holding and decreeing August 6, 1940, or at any other time that the proposed $110,000.00 mortgage had not been therefore effectively dissented to, that the reorganization trust had not been terminated and that respondents had not been removed as reorganization trustees.

(13) In entertaining respondents' petition of April 18, 1941, praying that your petitioner be punished for contempt and, further, be permanently restrained from prosecuting petitioner's libel action in the State court.

(14) The District Court in including in the order confirming the plan of reorganization the provisions of that order, paragraphs numbered 18 and 21 thereof, in terms "reserving" jurisdiction in the premises not provided for or contemplated in and inconsistent with the plan of reorganization and contrary to and in violation of the Bankruptcy Act; and the Circuit Court of Appeals in not holding that those attempted "reservations" are void and of no effect.

(15) In that both the District Court and the Circuit Court of Appeals have denied your petitioner his guaranteed civil rights of personal liberty, of property and freedom of speech and otherwise denied your petitioner his constitutional rights to due process of law.

(16) In that the District Court has not long since entered final decree in the bankruptcy proceedings proper.

(17) The District Court in entering, the Circuit Court of Appeals in affirming the District Court's order of December 1, 1941 (R. 46).

Summary.

Representation of both Debtor and Bondholders Committee by the same counsel, now counsel for respondents (see Trans. 6696, p. 66, last 16 lines) and the attempted "reservation" (save the mark!) of life-time guardianship of the reorganization trustees, creatures * of the House of Issue, are foreword of the subsequent "sordid history of this reorganization matter" (Opinion, R. 69,

* Report of Securities & Exchange Commission, Part 3, particularly pages 148-149.

lines 16 and 17 from bot.) and this case's opening contribution to the current rechristening of the "Bondholders' Committee racket" by the man in the street as "Bondholders-Committee-Receivership racket".

From and after the fixing of fees in November, 1935 (R. 34), to date, all involved proceedings have been matter of struggle of your petitioner to protect and enforce rights of stockholders under the plan of reorganization and reorganization Trust Agreement, at first by invoking, illadvisedly but in entire good faith, the supposed powers of the District Court in terms reserved to the court in its order of March 7, 1935 (Trans. 7497, par. 17, p. 7, and par. 21, p. 8), confirming the plan of reorganization, and sometimes by exercising stockholders' rights, especially (Trust Agreement, Art. 6, Sec. 4, Trans. 7497, p. 145; Art. 8, Sec. 8, Trans. 7497, p. 147) to remove trustees and (Trust Agreement, Art. 7, Trans. 7497, pp. 146-147; Art. 8, Sec. 8, Trans. 7497, p. 147) to terminate the trust; and, on the other hand, matter of efforts of respondents and the District Court (by coercion and otherwise, and in violation, so your petitioner insists, of the Plan of Reorganization, the Trust Agreement, the Bankruptcy Act (R. 44) and the guaranteed civil rights of your petitioner and other stockholders to sustain wrongful acts of respondents in the premises and to perpetuate the trust and respondents as trustees and, consequently, as directors of the reorganized debtor corporation.

The plan of reorganization is confirmed March 7, 1935, Trust Agreement and trust certificates approved and all details of the bankruptcy proceedings proper disposed of by November 18, 1935 (*supra* pp. 3-4). From then to January 18, 1938, there are no proceedings whatever in the bankruptcy case itself. But your petitioner, January

24, 1938 (*supra* p. 4), moves for leave to intervene and while this and successive like motions are pending, on May 14, 1938, the sleeping giant stirs and entry of final decree in the bankruptcy proceedings is set for June 15, 1938, is followed by orders of continuance of entry of the final decree the last of which (Sept. 30, 1938) continues the same generally (*supra* p. 4).—Whether the sleepers stirred from nervousness or someone got the notion that the entry of final decree would be one way to get rid of the proposed Thomas petition but later decided that to leave the sanctuary was too big a price for respondents to pay does not appear expressly on the record; but at all events no final decree is or ever has been entered.

Your petitioner's third motion still pending, on May 5, 1938, the District Court enjoins petitioner from criticizing the trustees by letter to his fellow stockholders.—A stockholder has **no rights out of court.**

May 23, 1938, the plan of reorganization of the debtor having been long since confirmed and consummated, the District Court, in spite of its attempted reservation of an indefinitely continuing guardianship of the trustees, refuses to permit your petitioner to complain of the trustees **even to the court.** This, on the ground, among others, that petitioner's would-be complaints are not within the jurisdiction of the Bankruptcy Court in terms reserved in the order of confirmation. Under its so-called reservation, the court is creche not reform school for the trustees.—The reasons be what they may, a stockholder **has no rights in court.**

Petitioner declaring that he will appeal from that refusal, the Bankruptcy Court manhandles him—coerces him by threat otherwise to attach him for fancied con-

tempt of court, to consent to be enjoined **pending such possible appeal** from communicating with his fellow stockholders or using his powers of attorney from stockholders. —This manhandling of petitioner by the court is keystone of the subsequent continued "sordid history of this reorganization matter; (Opinion R. 69, lines 16 and 17 from bot.).

Petitioner never does so appeal and legal possibility of his doing so ends at midnight June 22, 1938; but petitioner does appeal from the injunction of May 26, 1938. The Court of Appeals holds (1) that petitioner's consent to the injunction was not coerced, the record clearly to the contrary notwithstanding, (2) that **on the whole record** the injunction restrained petitioner merely "as a litigant" pending appeal by petitioner from the order of May 23, 1938, refusing to let petitioner become a litigant, and (3) that **such being the nature of the injunction** the District Court had jurisdiction to enter the same. *In re 4145 Broadway Hotel Company,* 100 Fed. 2nd, 7.

The time for appeal by petitioner from the order of May 23, 1938, closing the court's doors in petitioner's face having expired at midnight June 22, 1938, petitioner, out of abundance of caution, petitions the trial court to spread of record the demise of the injunction entered to preserve the *status quo* pending the appeal that was never taken. The trial court denies this petition,—refuses to inter the order of injunction. Petitioner petitions the Court of Appeals to reverse this refusal, and that court denies leave to appeal on the ground, in effect, that it is discretionary with the District Court whether or not to recognize that the demised injunction is dead. *In re 4145 Broadway Hotel Company,* 130 Fed. 2nd (April 27, 1939) 487.

The dead being dead tho not interred, the expressions of the Circuit Court of Appeals of April 27, 1939, in *In re 4145 Broadway Hotel Company,* 130 Fed. 2nd, 487, not being an adjudication but refusal to adjudicate, and the Circuit Court of Appeals having solemnly declared in *In re 4145 Broadway Hotel Company,* 100 Fed. 2nd, 7, 10, that it was "not passing upon the right of the appellant, or any other certificate holder, to take any proper action in the future which is authorized by the terms of the trust agreement", your petitioner on referendum as of May 1, 1939, held under and in accordance with the terms of the Trust Argeement, votes under his powers of attorney for termination of the trust. Thereby, if his votes are counted, the trust is terminated as of May 1, 1939.

Again pursuant to and in accordance with the provisions of the Trust Agreement, your petitioner on May 22, 1940, votes over a third of the outstanding stock in dissent to the placing of a $110,000.00 mortgage on the reorganized company's property. Thereby, if his votes are counted, the placing of that mortgage is defeated.

Again pursuant to and in accordance with the provisions of the Trust Agreement, on June 15, 1940, your petitioner files with the trustees declaration and demand by over 51% of all outstanding shares of stock removing the trustees. Thereby, if his voice and through him the voices of his principals are heard and heeded, the trustees are removed as of June 15, 1940.

Then by petition of June 17, 1940 (Trans. 7497, pp. 17-27), respondents herein raise to the court a Macedonian cry for help; and by decretal order of August 6, 1940 (Trans. 7497, p. 161, par. 9) the District Court, his Honor William H. Holly, judge presiding, finds and holds that

the injunction of May 26, 1938, is still in full force and effect (as it were, that by refusing March 20, 1939, to bury the deceased injunction the court raised it from the dead), and **on this premise** his Honor holds that the supposed mortgage has not been effectively dissented to, that the trust has not been terminated and that the trustees have not been removed.

Like the Psalms, this "sordid" story reaches its climax in the middle.

No one better knew than the District Court, his Honor William H. Holly, judge presiding, that the injunction of May 26, 1938, was only to preserve the *status quo* of the Thomas proceedings, not of the bankruptcy proceedings proper, and only pending possible appeal by your petitioner from the order of May 23, 1938, and that such was the only injunction your petitioner's consent to which his Honor successfully coerced. No one better knew than the District Court, his Honor William H. Holly, judge presiding, what the deal between the court and petitioner on May 23, 1938, really was. The climactic breach of faith by the court on August 6, 1940, in holding that injunction still in full force and effect is perhaps the most sordid incident in the "sordid history of this reorganization matter" (Opinion, R. 69, lines 16 and 17 from bot.).

For a time all had been quiet on the front.—Then February 28, 1941 (Trans. 7763, pp. 18-21), respondents write advisingly and persuasively to stockholders touching referendum as of May 1, 1141, to determine whether the trust shall continue for another two years or terminate as of May 1, 1941 (Trans. 7763, p. 8, par. 3).—Your petitioner replies (his letter to stockholders of March 15, 1941 Trans. 7763, pp. 27-30), and participates

and contributes to the sending out to the stockholders of the King letter of March 17, 1941 (Trans. 7763, p. 25).—Respondents, evidently feeling that if the trust is to be continued, the stockholders need stronger drink, on March 24, 1941 (Trans. 7763, pp. 31-37), take calf rope again circularize stockholders and by enclosure recommended to their consideration (Trans. 7763, p. 35, last 7 lines—page 37, first 6 lines) charge that your petitioner is "a cheat and a liar" and "dishonest", and in open court was unanimously declared so to be by three judges of the United States Circuit Court of Appeals "appointed by the President of the U. S."—April 4, 1941 (Trans. 7763, p. 14, par. 14) your petitioner brings suit in the State court, Cook County, Illinois, against respondents for libel.—Respondents cut to the cover of the arms of the District Court, his Honor William H. Holly, judge presiding. By petition of April 18, 1941 (Trans. 7763, pp. 6-46) they pray (Trans. 7763, pp. 16-17) that your petitioner be punished for contempt and, further, be **permanently** restrained from prosecuting petitioner's libel action in the State court.

The mere pendency of the petition of April 18, 1941, was Sword of Damocles to further exercise of petitioner's rights anent the referendum as of May 1, 1938; but remained to State court action for libel. That was neatly pocketed on June 2, 1941 (Trans. 7763, p. 96) by the third injunction of petitioner restraining him "until further order of this court" from prosecuting his State court action for libel,—his Honor Wm. H. Holly stating that he entered this third injunction without knowing whether he had any authority to do so or not (Trans. 7763, p. 72, lines 16-17), but would "take a chance and enter the order" (Trans. 7763, p. 72, lines 19-20). Altho his Honor said (Trans. 7763, p. 72, lines 4-5) that all he wanted was that the libel action "stay in *status quo*

until I [he] can pass upon the questions that are presented" (meaning presented by the petition **permanently** to enjoin your petitioner from prosecuting the State court action for libel), in spite of that assurance your petitioner was moved, *mirable dictu,* to appeal, and at long last got the first break. *In re 4145 Broadway Hotel Company,* 124 Fed. 2nd, 821.

But December 1, 1941 (R. 46) comes petitioner's jail sentence, affirmed by the Circuit Court of Appeals July 18, 1942, petition for rehearing filed September 25, 1942 (R. 83), rehearing denied December 4, 1942 (R. 105).

ARGUMENT.

I.

This Honorable Court is not bound by any of the prior decisions herein of the Court of Appeals.

As observed by the Circuit Court of Appeals for the First Circuit, any decision of a Court of Appeals "stands or falls on its merits and has no improved standing before the Supreme Court from the fact that it resulted from an application of our [the Court of Appeals'] law of the case". *White* v. *Higgins,* 116 Fed. 2nd, 312, 317.

This Honorable Court has power now to do complete justice in the premises to your petitioner.

II.

Lack of jurisdiction of the subject matter can never be waived.

As will further appear, with few if any exceptions the questions presented involve, either primarily or in the alternative, issue as to the trial court's jurisdiction of the subject matter.

Consent of the parties will not confer jurisdiction of the subject matter. *Nixon* v. *Michaels,* 38 Fed. 2nd, (8th CCA), 420, 423; *Chicago Portrait Co.* v. *Chicago Crayon Co.,* 217 Ill. 200, 202; *Kneisel* v. *Ursus Motor Co.,* 323 Ill. 452. Tho the question was not raised below, it is the duty of the reviewing Court to determine the trial court's jurisdiction. *Nixon* v. *Michaels,* 38 Fed. 2nd, (CCA 8) 420, 423. The principles of law and rules of practice

are the same tho the lack of jurisdiction of a lower reviewing court (as, in the instant case, the Court of Appeals) turns upon lack of jurisdiction in the *nisi prius* court. *Kneisel* v. *Ursus Motor Co.*, 323 Ill. 452, 453, 458; *Chicago Portrait Co.* v. *Chicago Crayon Co.*, 217 Ill. 200, 202. Jurisdiction of the subject matter is conferred by law, not by erroneous assumption or decision of the court. *Smith* v. *Herdlicka*, 323 Ill. 585, 590. *O'Brien* v. *People*, 216 Ill. 354, 363. So of the implied adjudication of jurisdiction necessarily incident to assumption of jurisdiction to enter a void judgment or order. *Soldiers Creek Drainage District* v. *I. C. R. R. Co.*, 323 Ill. 350, 358. *People* v. *Swearengen*, 273 Ill. 630, 641, 642. Erroneous determination by the court that it has jurisdiction is not to be confused with determination by the court. *Chicago Title & Trust Co.* v. *Storage Co.*, 260 Ill. 485, 495. *Gardner* v. *Maroney*, 95 Ill. 552, 560.

And the right to question a judgment or order for want of jurisdiction of the subject matter is not limited or restricted by rules touching rights of appeal or writ of error. *Bell* v. *Mattoon Waterworks, etc., Reservoir Co.*, 235 Ill. 218, 219. *Buckmaster* v. *Carlins*, 4 Ill. 104, 108, 110.

III.

The claimed consent of your petitioner to the injunction of May 26, 1938, and whether that injunction was as contended by your petitioner or as subsequently erroneously construed by the lower courts is nullified by the facts of record.

On the first appeal, where alone the question was discussed, the Circuit Court of Appeals disposed of the issue with the statement (*In re 4145 Broadway Hotel Co.*, 100 Fed. 2nd, 7, 9, par. 5) that "it is as plausible to

argue that the District Court was induced to refrain from entering an order imposing a contempt penalty by appellant's representation that there would be no appeal from the order of injunction, as it is to insist that appellant was coerced into consenting to the injunctive order by the court's threat to impose a penalty for contempt".

What actually occurred on May 23, 1938? The District Court, his Honor William H. Holly, judge presiding, said that to send out petitioner's letter of April 27, 1938, at a time when petitioner's motion for leave to file his proposed second amended petition was pending was distinctly contempt of the District Court (Trans. 6696, p. 63, 3rd from last par); that the court did not want to enforce any penalty for contempt of court but that if "this sort of thing is to continue" the court would "have to take appropriate action for what has been done", but that if petitioner was willing that injunction be entered the court would not be inclined to punish for what has been done (Trans. 6696, p. 64, 3rd and 4th pars). Petitioner asked whether he could appeal from the restraining order and his attorney assured him that he could (Trans. 6696, p. 64, last 2 lines; *post,* 76). His Honor reiterated that if necessary he would impose a penalty "for what has been done" but if injunction be entered he "would be inclined to overlook what has been done". Petitioner's attorney suggested to his Honor that petitioner had a right to appeal from such restraining order (Trans. 6696, p. 65, first 4 pars.; *post,* 76). His Honor said that he wished to know whether there is a consent and that if petitioner didn't want to agree, **"if it cannot be a consent order, we will proceed on the contempt matter"** (Trans. 6696, p. 66, 1st and 15th pars). And when the court gave instructions for the order he

said (Trans. 6696, p. 67, 5th and last pars.), "Draw a consent order to that effect. * * * Prepare a consent decree and I will forego the contempt".

It was never suggested at the hearing, to use the language of the Circuit Court of Appeals (*In re 4145 Broadway Hotel Co.*, 100 Fed. 2nd, 7, 9, par. 5), "that there would be no appeal from the order of injunction". What did occur was that from the first the court was threatening petitioner with attachment for fancied prior contempt in sending out petitioner's letter of April 27, 1938, unless petitioner would agree to being enjoined and that when it was suggested that petitioner might appeal from such injunction the court threatened petitioner with attachment for the fancied previous contempt unless petitioner agreed that the order of injunction should on its face be a consent order. The net of which is that petitioner was coerced into agreeing to entry of an order of injunction and coerced into agreeing that it should appear on the face of the order that it was a consent order.

As will more and more appear herein, some parts of "the sordid history of this reorganization matter" (Opinion, R. 69, 17th line from bot.) consists of recurring almost astonishing disregard by the lower courts of the actual record.

IV.

The injunction of May 26, 1938, constrained petitioner only while appeal from the order of May 23, 1938, was possible; and expired at midnight June 22, 1938.

This injunction order is to be construed not from its mere face but from its occasion and purpose at the time of its entry as appearing from the whole record. *In re 4145 Broadway Hotel Co.*, 100 Fed. 2nd, 7, 8. *Camille, Inc.* v. *D. W. Fitch Co.*, 30 Fed. Supp. 532, 533. *Local Draft Board No. 1, etc., et al.* v. *Connors* (CCA 9), 124 Fed. 2nd, 388, 390. The Circuit Court of Appeals was absolutely correct in holding on the first appeal (*In re 4145 Broadway Hotel Co.*, 100 Fed. 2nd, 7, and footnotes) the whole record should be considered and that the injunction constrain your petitioner only pending possibility of appeal from the order against him of May 23, 1938. This is further and conclusively established by the record herein of the proceedings of May 23, 1938 (Trans. 6696, p. 64, lines 23-28, 38-41; p. 65, lines 22-24, 35-41; p. 66, last 3 lines; p. 67, lines 5-14, and last 3 lines).

Possibility of appeal by petitioner from the order of May 23, 1938, denying him leave to file his proposed second amended petition expired at midnight June 22, 1938, by operation of law. A temporary injunction expires by mere passage of the occasion for its entry or fulfillment of its initial purpose, and then without any order whatever of the court which entered the same; and refusal under such circumstances formally to vacate or otherwise make of record the fact of termination of such an injunction is to be presumed to have been on the ground that such vacation or declaration of record was needless. *Sweeney* v. *Hanley*, 126 Fed. (.... CCA) 97, 99; cert. den. 183 U. S. 700.

V.

As construed by the District Court and, except on the first appeal, by the Circuit Court of Appeals, the District Court was without jurisdiction to award the injunction of May 26, 1938.

It is unquestioned and never has been questioned by respondents, by the District Court or by the Circuit Court of Appeals that the injunction of May 23, 1938, is a temporary injunction, an injunction *pendente lite.* The *lis pendens* pending which your petitioner was temporarily enjoined was what we call for convenience the Thomas proceedings, that is your petitioner's motion (his two prior motions no longer pending but already finally disposed of) for leave to file his proposed second amended petition. If, as petitioner insists, such was the *lis pendens* pending which your petitioner was enjoined, it is self-evident that when that *lis* ceased to be pending the injunction *pendenting* that *lis* ceased to be operative the moment there was no longer any such *lis* pending for the injunction to operate upon. This is perfectly clear if the injunction order is written and read in the light of the whole record. So expanded it reads that thereby your petitioner, his agents, attorneys and employees, be and each of them is, enjoined and restrained until the further order of this Court **pending possibility of appeal by your petitioner from the order of May 23, 1938, denying your petitioner leave to file his proposed second amended petition.** And so read, as petitioner insists it must be read, *by its own terms* it expired at midnight on June 22, 1938, your petitioner having taken no such appeal and the legal possibility of any such appeal by petitioner having passed at midnight June 22, 1938.

To meet this, respondents and the lower courts project into the picture a claimed second and a claimed third *lis pendens,* (1) the bankruptcy proceedings proper (no final decree having been entered therein), and (2) the matter of the reorganization trust of May 1, 1935 (jurisdiction of the same having been "reserved" in the order of confirmation).

On the three-*lis-pendens* theory, the contention is (Opinion, R. 70) that until final decree was entered in the bankruptcy proceedings proper the District Court **had jurisdiction** to enjoin petitioner in terms of the injunction of May 26, 1938, **until the final decree was entered** in the bankruptcy proceedings proper; and that until expiration of the trust evidenced by the Trust Agreement of May 1, 1935, the District Court **had jurisdiction** to enjoin petitioner in terms of the injunction of May 26, 1938, **until expiration of that trust.**

"Moreover" (Opinion, R. 70, 7th from last line), in the instant case the Court of Appeals raises still another question of **jurisdiction.** Having already declared that the District Court had jurisdiction so to enjoin your petitioner so long as no final decree had been entered in the bankruptcy proceedings proper and so long as the reorganization trust continued to exist (Opinion, R. 70)), the Court of Appeals holds (Opinion, R. 70, lines 2-7 from bot.) that independently of entry of final decree or continued existence of the reorganization trust, the District Court had jurisdiction under Section 207, 11 U.S.C.A., paragraph (h) as long (so it would seem) as the business of the new reorganization entity (whether a new corporation or the debtor corporation reorganized, as the case might be) remained in "operation"!—Having so just held, the Court of Appeals further holds

that the injunction of May 26, 1938, was entered in exercise of this asserted jurisdiction under paragraph (h) of Section 207, the court saying (Opinion, R. 70, last 2 lines), "This is the clear purport of the order of May 26, 1938".

Under our immediate heading (Our Point VI, *supra* page 47) we are, as there stated, presenting the question of the jurisdiction or lack of jurisdiction of the District Court on May 26, 1938, to enjoin your petitioner in terms of the face of the injunction of that date except for and during the pendency of the Thomas proceeding, that is, as it turned out, until midnight June 22, 1938, when your petitioner's right of appeal from the order of May 23, 1938, refusing him leave to file his proposed second amended petition expired by statutory limitation without his having taken such appeal. Our position is that if, as claimed by respondents and held by the Circuit Court of Appeals, the injunction is construed (as we would put it, misconstrued) as restraining your petitioner after midnight June 22, 1938, when the Thomas proceedings ceased to be pending, the District Court was without jurisdiction to award the injunction and the injunction was void *ab initio*.

The questions of proper construction of the order of injunction and of the jurisdiction of the District Court on May 26, 1938, are closely interrelated,—so closely interrelated that it is difficult to discuss the one without being led into discussion with the other. We presently take up the Circuit Court of Appeals' three supposed grounds of jurisdiction in the District Court on May 26, 1938, to award an injunction in terms and purport as the injunction of May 26, 1938, is misconstrued by the lower courts to have been. First, however, possibly at the price of digressing, the Court of Appeals holding

(Opinion, R. 70, last 2 lines) that "the clear purport of the order of May 26, 1938" is that it was exercise by the District Court of its jurisdiction under Section 207, paragraph (h).

VI.

The order of injunction of May 26, 1938, does not purport on its face or appear from the record aliunde its face to have been entered in exercise of claimed jurisdiction under 11 U.S.C.A., Section 207, paragraph (h).

The Court of Appeals (Opinion, R. 70) intimates that the District Court might have entered the injunction as misconstrued by respondent and the lower courts under its residue of jurisdiction because the final decree had not been entered, or might have entered it under its supposed jurisdiction by virtue of the attempted reservation of jurisdiction in the order confirming the plan of reorganization, but actually holds that its entry was exercise of jurisdiction under paragraph (h) of Section 207. The Court of Appeals rests this holding on what it says (Opinion, R. 70, last 2 lines) "is the clear purport of the order of May 26, 1938". In fact there is absolutely nothing on the face of that order indicating or purporting anything of the kind. It follows that in stating that such is the purport of the order of May 26, 1938, the Court of Appeals must of necessity be alluding to and relying upon matters of record *aliunde* the order of May 26, 1938. (It is for that reason that we elsewhere present and contend that in its opinion herein the Court of Appeals in effect holds that the purpose and effect, the purport of that order is properly to be determined from the whole record.) But the Court of Appeals to the contrary notwithstanding, absolutely nothing of the kind is to be found in the

record. The issue being raised by respondent and entertained by the lower court as to whether the injunction order was entered in the Thomas proceedings or, final decree not having been entered, in the bankruptcy proceedings proper or under the attempted reservations of jurisdiction in the order confirming the reorganization, or, as now for the first time in the history of the litigation presented, one only need to read the order of May 26, 1938 (Trans. 7497, pp. 10-11; same order Trans. 6696, pp. 17-18) to know that, willy-nilly, to determine the nature, purpose, effect and purport of that order resort must be had to the record *aliunde* the face of that order. And the record *aliunde* the face of the order is conclusive (*supra* page 43).—In other words the Court of Appeals holding that the order of May 26, 1938, was entered under and pursuant to paragraph (h) of Section 207 is just wishful thinking. What the Court of Appeals really does is ignore the record (Proceedings of May 23, 1938, Trans. 6696, pp. 62-67; reprinted, *post*), make a guess that the order was entered under paragraph (h) of section 207 and then determine "the clear purport of the order of May 26, 1938," on the assumption that the court has guessed right and that since the order was entered under paragraph (h) of section 207 its "clear import" is that it was to continue in full force and effect as long as the business of the new reorganization entity (whether a new corporation or the debtor corporation reorganized, as the case might be) remained in "operation".—In other words guess upon guess.

If the Court of Appeals' two guesses or its guess as to the purport of the injunctional order be taken as correct, as the injunction is so misconstrued your petitioner was enjoined by the District Court, on one theory of

the District Court's jurisdiction until final decree was entered in the bankruptcy proceedings proper, on another jurisdiction theory until expiration of the reorganization trust and on the Court of Appeals' favorite theory as long as the business of the new reorganization entity remained in operation,—presumably even unto the third and the fourth generation. And this on the sole ground that while the Thomas proceedings were pending your petitioner sent out to his fellow stockholders his letter of April 27, 1938 and without a scintilla of proof that in that letter there was a single false statement of fact or one undeserved charge against or reflection upon respondents herein.

How could that letter trespass upon the District Court's powers under paragraph (h) of Section 207 "to put the plan into effect" (Opinion, R. 70, 6th from last line) or be taken as "inconsistent with" or likely to interfere with the * * * execution of the plan as confirmed" (Opinion, R. 70, 3rd and 4th lines from the bot.)? That plan had years prior been "executed" (*supra* pp. 21-22). Consummation of the plan was execution of the plan. As respondents say (Trans. 6696, p. 38, par. 11; *supra* pp. 21-22), under oath (Trans. 6696, p. 44), the plan was consummated only some months after March 7, 1935, that is (Trans. 6696, p. 6, 9th line) June 29, 1935. And if that is not enough, on oral arguments herein in the Court of Appeals occurred this colloquy:

> "Justice Minton: Now there was a plan adopted and promulgated and this Mr. Thomas was enjoined from interfering with that accomplishment?
>
> Mr. Ferguson: No, your Honor, Mr. Thomas was not on the scene then, he did not come along until about three years later.
>
> Justice Minton: Had the plan gone into effect?
>
> Mr. Ferguson: The plan had gone into effect, yes, your honor."

VII.

Section 207, paragraph (h), 11 U.S.C.A. gives no jurisdiction whatever to the District Court over the business or affairs of the new reorganization entity, whether a new corporation or the debtor corporation reorganized after confirmation and consummation of the plan of reorganization.

Ruling of the Court of Appeals to the contrary hits the bulls-eye. Not however of respondents' target but of the target, the aim of your petitioner and his counsel. to force into the open the real issue. If under the Act the court of bankruptcy has jurisdiction of the business and affairs of the reorganization entity, whether that entity be corporation or individual, it is because the intent of the Act is not to return the involved property and business to the economic system of the country, but while it rolls away the stone intends that Lazarus shall never be loosed and let go.

There is no word "operation" (Opinion, R. 70, 2nd and 3rd lines from bot.) in paragraph (h) of Section 207. And the would-be injection of the word "operation" into paragraph (h), without attempt of justification for the same, is confession that the support the Court of Appeals theory of the force and effect of paragraph (h) is to hold that the operation of the business of the reorganization entity is forever to be under the jurisdiction and control of the bankruptcy court. This, we insist, is a *reductio ad absurdum.*

The reorganization entity is not necessarily, indeed under the present racket seldom is the debtor, and usually and as in the instant case if the reorganization entity is a corporation its stockholders are not the

former stockholders of the debtor corporation but the debtor corporation's former creditors. Let us not be confused by formalities of corporate structure. At least in equity the stockholders are the corporation and change of stockholders makes a change of the corporation. In the very instant case the plan of reorganization actually provided for incorporation of a new corporation and issuance of stock of that new corporation to the creditors of the debtor corporation (The Plan, Appendix, *post*). In this respect the letter of the plan of reorganization was not followed. Our guess is that instead the amount of authorized common stock of the debtor corporation was changed to fit the situation and then taken and used as the stock to be issued under the plan of reorganization to the debtor corporation's creditors.

The jurisdiction of the bankruptcy court after confirmation and consummation of the plan of reorganization which obtains, tho limited, until final decree dismissing the debtor is jurisdiction of the corporate debtor and its stockholders, of what is left of the debtor's affairs, not jurisdiction of the reorganization entity and its stockholders, the former creditors of the debtor.—When the plan of reorganization has been confirmed and consummated the jurisdiction of the bankruptcy court is of only the leavings. When the cake had been baked and glazed, it remains to the court only to wash the mixing bowls and pans. The bankruptcy court is not supposed or authorized by the Act to itself eat the cake.

Not all the lower courts are entirely blind to this situation. In memorandum opinion filed May 12, 1942, in the matter of 168 Adams Building Corporation, United States District Court for the Northern District of Illinois, Eastern Division, which had been pending some eight years and for four years after the plan of reorganization had been confirmed. His Honor William J. Campbell says in part:

> "This is an intolerable situation and I do not believe that Congress, in enacting 77-B ever meant to authorize it. Here is a corporation that for years has enjoyed and is now enjoying the benefits and protection of the local government authority without paying anything, either on its huge tax delinquency or even on the current taxes. Neither the letter nor the spirit of the Act justify the court in continuing the matter indefinitely. In these matters there must come a time when the sanctuary of the United States Court must be withdrawn **and the enterprise left to stand on its own economic feet. That time has now come.**"

This "operation" theory is born of necessity, of necessity to amend paragraph (h) of section 207 by ill-conceived judicial *dictum*. It was sired, however, by respondents. They present (Their Petition, Trans. 7497, p. 26, par. 18) as reason for non-entry of final decree that "unless the liability for taxes and penalties can be eliminated, the property has no future and it is unlikely that there will be any realization for the certificate holders [the former creditors of the debtor and now the stockholders of the reorganization new entity] on their original investment." How long is the bankruptcy court to continue its efforts to pay dividends to the stockholders of this reorganization new entity? What has become of our sacred American rugged individualism?

VIII.

By arbitrarily delaying entry after consummation of the plan of reorganization of the final decree dismissing the debtor and terminating the case, the District Court gathers moss not more jurisdiction; and the Bankruptcy Act and Science of Jurisprudence gather only barnacles.

By the order of May 7, 1935, confirming the plan of reorganization, the plan was expressly "approved and

confirmed, and decreed to be in full force, virtue and effect" (Rec. 3); and, this, in terms and in law, was a final decree. *Downtown Investment Association* v. *Boston Metropolitan Buildings, Inc.,* 81 Fed. 2nd, (CCA 1, 1936) 314 317, 322.

In re: Deep Rock Oil Corp., 113 Fed. 2nd, 266, 269, and *Meyer* v. *Kenmore Granville Hotel Co., et al.,* 297 U. S. 160, 80 L. ed. 557, are to be distinguished as involving an order of approval not an order of confirmation.

In general and inherent in the statute, when the debtor corporation has been "reorganized in compliance with the Bankruptcy Act" the purpose of the Act is effected, the goal of the Act attained and the jurisdiction of the Bankruptcy Court ends. *Cont. Ill. Nat. Bk. & T. Co.* v. *Chicago, R. I. & P. Ry. Co.,* 72 Fed. 2nd, (CCA 7) 443, 451. *In re Schroeder Hotel Co.,* 86 Fed. 2nd, (CCA 7) 491, 493. *Old Fort Improvement Co.* v. *Lea,* 49 Fed. 2nd, (CCA 4, 1937) 286, 291.

The District Court as merely a court of equity no more has jurisdiction to supervise a reorganized corporation than to review or revise proceedings in bankruptcy. The Bankruptcy Act contemplates and authorizes transfer of the debtor's property to the reorganization entity for operation by that new entity,—not by the debtor or under continued control or supervision by the court. 8 C. J. S. (1st Ed., 1938), title Bankruptcy, Sec. 592, p. 1600. *Consolidated Gas, Elec. L. & P. Co.* v. *United Rys. & Elec. Co.,* 85 Fed. 2nd, (CCA 4, 1936) 799, 805, 2nd col.

A petition under Section 77 "contemplates a reorganization. That is the gist of the litigation, the heart of the petition, if it may be so called. To equitably adjust debts

of the debtor, * * *, make provision for its successful operation [by the reorganized debtor]—these are the objects sought". *In re Chicago & N. W. Ry. Co.*, 121 Fed. 2nd, (CCA 7) 791, 797.

The jurisdiction of the District Court which respondents would invoke is not the jurisdiction in bankruptcy acquired by the District Court by the institution of case No. 56875, but "the jurisdiction of this court over the 4145 Broadway Hotel Company stock voting trust, * * *: which jurisdiction", respondents say, "was acquired by this court in the course of the reorganization proceedings * * *, * * * reserved * * * by the decree of March 7, 1935" (Respondents' Petition, p. 6, Rec. 16, par. 17; par. 19.) That is to say that by the order finally confirming the reorganization plan, the District Court acquired a further jurisdiction by reserving jurisdiction which the District Court never had.

The consummation of the plan of reorganization adds nothing to the District Court's jurisdiction in bankruptcy, even tho its reluctant hand retards and postpones entry of the prescribed final decree dismissing the debtor and closing the case. At long last the court takes a pick at it (R. 35) but only to drop the matter (R. 36) and let it lie for years. Maybe the District Court's dereliction in not discharging the duty which the Act places on that court itself cannot be assigned as error. Maybe the only effective remedy would be mandamus at the instance of the debtor. But can it reasonably be claimed by anyone or soundly held by any court that in the years the District Court continued to neglect and omit to perform its statutory duty its jurisdiction grew in its hand?

The Circuit Court of Appeals calls it "assuming" (Opinion, R. 70, line 16), but in fact concedes that our

contention under this our Point VIII is correct; but says that "its application is dependent upon the provisions of the plan as confirmed and reservations, not inconsistent therewith, contained in the order of confirmation."

IX.

After the entry of the final decree of confirmation of the plan of reorganization and consummation of the plan, the Bankruptcy Court is without jurisdiction over the reorganized debtor or its affairs except so far as jurisdiction is reserved in the plan itself consistently (if such is possible) with that plan and is authorized by the Bankruptcy Act. The attempted reservations of jurisdiction in the order of confirmation (supra page 24) are without basis in the plan of reorganization (supra page 25, and the Plan, our Appen'x., post), or, for that matter, in the reorganization trust agreement, and are not only inconsistent therewith but virtual nullification thereof and inconsistent with and unauthorized by the Bankruptcy Act. They would substitute for the reorganization trust agreement a mere court receivership not merely for the life of the reorganization trust but for the life of the business of the reorganization new entity.

So held by the Circuit Court of Appeals Fourth Circuit in *Consolidated Gas Elec. L. & P. Co.* v. *United Rys. & Elec. Co.*, 85 Fed. 2nd, 799, 801, 802-803, 806; cert. den. 57 Sup. Ct. 493.

And (tho perhaps beside the mark since in the instant trust agreement there was no relevant "reservation" of or attempt to confer non-statutory jurisdiction on the bankruptcy court, *supra* page 24) we dissent from *In re Corona Radio & Television Corp.*, 102 Fed. 2nd, 959, 963,

in that the Circuit Court of Appeals for the Third Circuit in terms distinguished the decision of the Circuit Court of Appeals for the Seventh Circuit in *In re Argyle-Lake Shore Corp.*, 98 Fed. 2nd, 372, on the ground that the trust agreement in that case provided for termination of the trust by vote of two trustees "subject to the approval of the District Court". As above presented, we insist that the Bankruptcy Act gives no jurisdiction to the District Court, once the plan of reorganization is consummated, to supervise or control the affairs of the reorganization entity or the reorganization trustees for the former creditors of the debtor and now *cestui que trustents* of the reorganized business, or, in case the reorganization new entity is a corporation, the stockholders thereof.

X.

As follows, the District Court was without jurisdiction to entertain respondents' petition of June 17, 1940 (Trans. 7497, pp. 17-27) to enter thereon the decretal order of August 6, 1940 (Trans. 7497, pp. 159-162), to hold therein that the injunction of May 26, 1938, continued in force after June 22, 1938, and was still in full force and effect, to hold therein that the reorganization trust had not been terminated in 1939, to hold therein that the proposed $110,000.00 mortgage was not effectively dissented to in 1940, and to hold therein that the trustees had not been removed in 1940; and erred in so doing.

The decretal order of August 6, 1940, "was not * * * necessary to effectuate any decree entered by the District Court in the reorganization proceeding" or any provision of any decree or order which the District Court had jurisdiction to enter or provide. *In the Matter of 4145 Broadway Hotel Co.*, 124 Fed. 2nd, 821.

The acts of the District Court in assuming by the decretal order of August 6, 1940, entered under respondents' petition of June 17, 1940, to pass upon the results of the referendum of May 1, 1939, of the balloting for approval or dissent to the placing of the proposed mortgage and on the force and effect of your petitioner's action of June 15, 1940, to remove respondents as trustees, were purely voluntary and extra-judicial acts. *People* v. *Crowley,* (Ill. App. Ct., First Dist.), 38 N. E. 2nd 556, abstract only.

XI.

Not only by order and affirmance of order committing your petitioner to jail, but over and over again in the course of "the sordid history of this reorganization matter" your petitioner has been denied his guaranteed civil rights, freedom of speech, right of contract, property rights and personal liberty.

We presume to quote his Honor Presiding Judge Evan A. Evans at the oral arguments of CCA cases numbers 7888 and 7891.

> "I am interested in Thomas having his say now as to whether or not the trustees are managing the property properly, and the question is,—is he barred from doing so by virtue of the order that was made along back in 1938 which prevented him, so far as your contention is concerned, prevented him permanently from writing any letters to stockholders. Regardless of what he may have done in the past is he barred from writing them making complaint of the action of the trustees? That is the principle that is involved that I complain of."

And further:

> "If this were a single isolated case I would not think of it so much as if it weren't. They name the trustees and name them for ten years. After the reorganization plans have been approved and adopted a certificate holder, who might be myself or might be you or anybody else, can't say anything about these trustees that are named for ten years."

XII.

Red Herrings, yes: The Circuit Court of Appeals' characterization of the history of this reorganization matter as sordid was wholly uncalled for and well calculated to prejudice your petitioner in more ways than one.

We discussed this with the Circuit Court of Appeals in our petition for rehearing (Our Petition, R. 86). The Court of Appeals itself said (Opinion, R. 69, lines 17-22) "that no good purpose could be served by detailed statement of the facts so elaborately argued by appellant for the reason that the only real question presented has to do with the jurisdiction of the court to enter and continue in force the injunction order of May 26, 1938 * * *." Why then refer to the factual history of this litigation and dub it "sordid"?

Even more uncalled for (Opinion, R. 69, lines 30-33) was the court's "Furthermore, appellant has cautiously and, we think, prudently refrained from presenting any argument in defense of or in extenuation of the punishment imposed by the District Court".—The writer of the opinion did not mean what he wrote, but what he meant to write may be inferred.

Petitioner is not here fighting for a few days one way or the other in or out of the county jail, nor for himself alone but for all of the present stockholders of 4145 Broadway Hotel Company and the general public. With so much at stake is your petitioner guiltily over-cautious and over-prudent in keeping up the fight to the last ditch, behind him only (a) the holding of the Circuit Court of Appeals for the Seventh Circuit in *In re 4145 Broadway Hotel Company,* 100 Fed. 2nd, 7, that the injunction of May 26, 1938, was a temporary injunction the purpose [ergo the effect] of which was only to preserve the *status quo* of the Thomas proceedings so long as an appeal by your petitioner from the order of May 23, 1938, was a

legal possibility, (b) the advice of his counsel and (c) his abiding faith that he would yet receive justice at the hands of the courts of his country?

Red Herrings! Even the gods sometimes nod. This type of argument is not reasoning but mere self-justification,—a lifting of preconcluded opinion by the bootstraps of prejudice.

XIII.

The proven public as well as private need of light in the premises from this Honorable Court.

It is but fair to say that the series of opinions of the Circuit Court of Appeals for the Seventh Circuit in the course of "the sordid history of this litigation" serve a purpose, as sometimes the wrath of man praises God:

No better proof could be asked or found than the opinion herein of the Circuit Court of Appeals, especially its last opinion, the cases there cited and the court's attempted use of those cases, of the sad need that this Honorable Court let a little sunshine in to dispel the fog in which the lower federal courts are muddling around in this type of case.

And it please your Honors, before you are petitioner and respondents. We say "respondent" for respondents are one, — the Bondholders Committee — Receivership Racket. Petitioner and Respondent are before your Honors,—crusader and crucifier. May the judgment of Solomon be your Honors',—and without having to cut the bondholders, stockholders herein, asunder or longer deny them freedom of speech.

Respectfully submitted,

F. Gerald Thomas,
Petitioner.

Lloyd C. Whitman,
Counsel for Petitioner.